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In the Supreme Court of the United States

October Term, 1950

No. [redacted] 76

P. G. Taylor, Reuben Foster, Henry W. Bovard, R. W. Harris, W. E. Hilsinger, Fearon Dodson, D. J. Waite, Hamilton Smith, P. G. Peterson, Wyne Blackwell, Individually and Doing Business as Sawyer & Foster, and Sawyer & Foster, a Partnership,

Petitioners,

vs.

John E. Russell and Wilma Russell,

Respondents,

and

Tucson Gas, Electric Light and Power Company, a Corporation, and The Industrial Commission of Arizona, a Public Agency,

Intervenors Below.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and Brief in Support Thereof

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. .....

P. G. TAYLOR, SEATON PORTER, HENRY W. BUTLER, R. W. HAMMILL, W. E. HAMILTON, FRANCIS BLOSSOM, D. J. WALSH, HARRISON SMITH, P. S. PELLETIER, WYNN MEREDITH, Individually and Doing Business as SANDERSON & PORTER, and SANDERSON & PORTER, a Partnership,
Petitioners,

vs.

JOHN E. HUBBELL and WILMA HUBBELL,
Respondents,

and

TUCSON GAS, ELECTRIC LIGHT AND POWER COMPANY, a Corporation, and THE INDUSTRIAL COMMISSION OF ARIZONA, a Public Agency,
Intervenors Below.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners named in the caption above, and each of them, being appellants in the court below, the intervenors being separate appellants there also, respectfully pray for

a writ of certiorari to the United States Court of Appeals for the 9th Circuit to review the decision and judgment of that court rendered March 14, 1951, affirming the judgment of the United States District Court for the District of Arizona for respondents, being appellees below, against petitioners in a certain suit at common law for personal injuries to Appellee John E. Hubbell (called herein appellee and plaintiff) catalogued in that Court as No. Civil 540 Tucson wherein the appellees were plaintiffs, these petitioners, for convenience called Sanderson and Porter, were defendants and the above named, Tucson Gas, Electric Light and Power Company (herein called Power Company), and the Industrial Commission of Arizona (herein called Commission), were intervenors, and the order of said Circuit Court of Appeals entered May 8, 1951, denying these petitioners' petition for a rehearing.

OPINION OF THE APPELLATE COURT

The Court of Appeals for the 9th Circuit Court rendered an opinion on the date above-mentioned. It has not yet been reported. It appears in the transcript of record in that part devoted to proceedings in said Circuit Court of Appeals (R 213).

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

This Court has jurisdiction to review the said decision and judgment of the Circuit Court of Appeals under 28 U.S.C. Sec. 1254.

An order was made by the Court of Appeals on May 9, 1951 staying issuance of mandate to and including June 12, 1951 conditioned upon the filing of this petition in this Court within the time last mentioned.

SUMMARY STATEMENT OF MATTER INVOLVED

Appellees are husband and wife. They filed an action in the Superior Court of Pima County, Arizona, at Tucson, against these petitioners, Sanderson and Porter, a partnership, for personal injuries to appellee John Hubbell allegedly due to the negligence of the defendants in permitting conductors to be charged with high voltage of electricity without warning to the appellee, who came in contact therewith to his personal injury. Defendants removed the action on the basis of diversity of citizenship, 28 U.S.C. 1332, 1441, to the United States District Court for Arizona at Tucson, Arizona. Thereafter the Industrial Commission of Arizona, a public agency, and Tucson Gas, Electric Light and Power Company, the employer of Appellee Hubbell, intervened as defendants.

Under the Constitution and laws of the State of Arizona and particularly Sections 56-949 and 56-950, Arizona Code Annotated, 1939, hereafter referred to as A.C.A. 1939, see appendix, an employee entitled to compensation from his employer for an injury due to "the negligence or wrong of another not in the same employ" • • • "shall elect whether to take compensation or to pursue his remedy against such other." If he elects to take compensation, his course of action against such other is automatically assigned to his employer's insurance carrier. If he elects to sue such other, he may nevertheless demand compensation for "the deficiency between the amount actually collected and the compensation provided or estimated herein for such case." (see 56-949). Acceptance of compensation benefits or application for an award constitutes a waiver of the right to institute an action in court against such other party (see Sect. 56-950).

Appellee was an employee of Power Company at Tucson, Arizona. For his injuries due to the accident on June 14, 1950, he was entitled to compensation from the Commission, his employer's insurance carrier.

He brought this suit against Sanderson & Porter as persons "not in the same employ" as himself who had allegedly from negligence caused his injuries (56-949).

In his complaint he took the affirmative on the two issues mentioned (for convenience we will call them independent contractors or perhaps better "identical employ," to use the apt expression of the Court of Appeals and election of remedy) (R 7, 11).

The defendants moved to dismiss the complaint upon a number of grounds (R 25). Thereafter, the Power Company and the Commission were allowed to intervene, by consent of the parties (R 51), and they took the position that plaintiff had elected to accept compensation from the Commission; that defendants were not independent contractors; and that plaintiff should be required to accept the benefits afforded him by the Workmen's Compensation Law. Intervenors also filed a motion for summary judgment (R 48), reaffirming their position, and therein your petitioners joined (R 55).

All motions being overruled, the defendants, your petitioners, filed an answer putting in issue negligence, whether they were independent contractors, the election of remedy by the plaintiff, and contributory negligence (R 56). The intervenors filed an answer raising the issues of election of remedies and identical employ (R 27).

At the trial the plaintiffs took the position that the undisputed evidence showed that Sanderson and Porter were

independent contractors and that the plaintiff had not made an election of remedies. These petitioners, at the close of the plaintiff's case (R 124) and at the close of the entire case (R 142) moved for instructed verdict on the grounds that the undisputed evidence showed that Sanderson and Porter were in the same employ with the plaintiff and that plaintiff had elected to take compensation. The intervenors took a position somewhat similar to that of these petitioners (R 126, 144).

Just before the case went to the jury, the Court announced that the only questions for the jury were the issues of negligence and contributory negligence (R 149), refused instructions requested by defendants (R 75) on the issues of election of remedy and identical employ; and charged the jury on the issues mentioned only.

Verdict went for appellees (R 79), on which judgment was entered (R 80). Thereafter the defendants renewed their motion for instructed verdict (R 84) and moved for a new trial, setting up, among other things, the refusal of the court to charge the jury on the issues mentioned (R 88), which said motions were denied (R 91, 92).

In the Court of Appeals the defendants (petitioners) did not attack the verdict of the jury on any ground concerning negligence, contributory negligence or the amount of the verdict, but did challenge the judgment of the district court on the grounds: that the undisputed evidence showed they were not independent contractors and that the plaintiff had made a binding election to accept compensation; and also that if there were a dispute in the facts as to these issues, or either of them, they should have been submitted to the jury (R 196); that said right existed under the Fed-

eral Constitution and statutes as well as the Arizona constitution and laws (R 198, 202).

In the Court of Appeals counsel for the appellees took the position that the undisputed evidence did show that the defendants were independent contractors and that the appellee had not made an election to accept compensation.

The Court of Appeals held that both parties were wrong and that there was evidence in the record supporting a finding either way on each issue (R 217, 218).

The Court took the position, however, not theretofore advanced by counsel for any party, that the determination of these issues, although in dispute as to the facts, was for the Court and not the jury and that it should be presumed that the trial judge correctly decided both of those issues on the facts for the plaintiff.

QUESTIONS PRESENTED

The questions presented are whether the Court of Appeals correctly interpreted the Constitution, laws and decisions of the Arizona Supreme Court concerning the application of the Workmen's Compensation Law of that State in reference to the acts constituting an election by an employee of one insured under the Compensation Act to accept such compensation rather than pursue his common law action for negligence against another not in the same employ as himself, what constitutes a person not in the same employ as the injured person, and whether where the evidence in an action by the injured person against one allegedly not in the same employ is in dispute as to those two issues of fact (election of remedy and identical employ), or either of them, the determination thereof is for the Court alone or for the jury.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

Petitioners take the position that the Court of Appeals has decided important questions of Arizona law in a way in conflict with the applicable and controlling decisions of that State and contrary to the constitution and laws thereof in this, to-wit:

I.

On the undisputed facts in this case these petitioners, defendants below, were in the same employ as the plaintiff, and, therefore, not subject to liability because of the provisions of Section 56-949, Arizona Code Annotated, 1939.

II.

On the undisputed facts in this case, the plaintiff did make a binding and conclusive election to accept compensation under the Workmen's Compensation Law to the exclusion of any right or remedy to recover from the defendants as persons not in the same employ with the plaintiff, 56-949, 56-950, A.C.A. 1939, and the Court of Appeals was in error in holding that no election resulted unless appellee had (1) knowledge of the alternative remedies available and (2) knowledge that the law precluded him from pursuing but one of such remedies.

III.

That, taking for the argument as correct the decision and opinion of the Court of Appeals holding that there were disputed questions of fact on

(a) The issue of identical employ, and

(b) The issue of election of remedy, the determination of those issues, and each of them, should have been left to the jury;

(c) Petitioners respectfully contend also that the Court of Appeals in holding that said issues of fact were for the decision of the Court and not the jury so far departed from the accepted and usual course of judicial proceedings, and particularly the provision of the Seventh Amendment to the U. S. Constitution and the Rules of Civil Procedure for district courts, particularly 38 and 39 and so far sanctioned such a departure by the United States District Court, as to call for an exercise of this Court's power of supervision.

Wherefore, petitioners respectfully pray that a writ of certiorari be issued to the United States Court of Appeals for the 9th Circuit commanding that Court to certify and send to this Court for its review and determination the full and complete transcript of record and all proceedings entitled as in the caption of this petition and catalogued in the lower court as No. 12,594, and that the decision and judgment of the United States Court of Appeals for the 9th Circuit be reversed by this honorable Court and that your petitioners may have such other and further relief in the premises as to this honorable Court may seem just.

GERALD JONES,
of CONNER & JONES,
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Tucson, Arizona
Attorney for Petitioners

CERTIFICATE OF COUNSEL

I, the undersigned counsel for petitioners herein, do hereby certify that the foregoing petition for a writ of certiorari in my opinion is well founded and meritorious and is not interposed or filed for the purpose of delay.

GERALD JONES,
of CONNER & JONES,
303-7 Valley National Building,
Tucson, Arizona
Counsel for Petitioners

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. .....

P. G. TAYLOR, SEATON PORTER, HENRY W. BUTLER, R. W. HAMMILL, W. E. HAMILTON, FRANCIS BLOSSOM, D. J. WALSH, HARRISON SMITH, P. S. PELLETIER, WYNN MEREDITH, Individually and Doing Business as SANDERSON & PORTER, and SANDERSON & PORTER, a Partnership,
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JOHN E. HUBBELL and WILMA HUBBELL,
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and

TUCSON GAS, ELECTRIC LIGHT AND POWER COMPANY, a Corporation, and THE INDUSTRIAL COMMISSION OF ARIZONA, a Public Agency,
Intervenors Below.

Brief in Support of Petition For Writ of Certiorari

See Reasons for Allowing Writ in Petition:

ARGUMENT

I.

Identical Employ

The statutes of Arizona define the term: "Independent Contractor." Sect. 56-928. (All statutes are found in the appendix.) This statute has been before the Supreme Court of Arizona in a number and variety of cases and the rule has been laid down that "the test to determine if

one is an employer or an employee is whether the employer retains supervision and control of the work."

Industrial Com. v. Byrne, 62 Ariz. 132, 134, 155 P(2) 784.

Haggard v. Industrial Com.—Ariz.—223 P(2) 915 (Nov. 1950) See Syl. 13.

A new plant was to be installed in Tucson area and integrated with the existing facilities. That the Power Company could carry out this work under the supervision of its own trained personnel, supplemented where needed by engineering assistance, cannot be seriously questioned. They employed Sanderson and Porter under a written contract appearing in the Record (unfortunately not indexed but found at page 35 et seq.). Unless parties may not make themselves employees of another under such circumstances as exist here (and we know of no reason therefor) the defendants became by such contract employees of the Power Company. The right of complete supervision was vested in the Power Company. Without objection the Court received evidence, first from plaintiff's witness Lovell (R 112 to 149) and later from defendants' witnesses Snider (R 127 to 132) Saunders (R 132 to 136), and Broockman (R 136 to 141) which, we submit, shows that the actual control and supervision of the work was consistent with the contract and always in the hands of the Power Company.

II.

(See Reasons for Allowing Writ in Petition)

Election of Remedy

In Arizona an employee of an insured employer is faced with the necessity of making an election of remedies

against his employer. He must choose between compensation benefits on one hand and his rights to sue on the other under the Employer's Liability Act and/or the common law. Prior to 1925 when Article XVIII, Sect. 8 of our Constitution went into effect (See App.), the injured employee could make his election after his injury. The leading case under the old law was *Consolidated Arizona Company v. Ujack,* 15 Ariz. 382, 139 P. 465. Said the Court:

> "The last sentence of section 14, reads: 'Any suit brought by the workman for a recovery shall be held as an election to pursue such remedy exclusively.' This seems to us a plain declaration by the legislature that the employee is at liberty to pursue any of the remedies provided by law until he adopts one by instituting a suit for redress, when the one adopted becomes exclusive."

This right of an employee to elect his remedy against his employer after injury proved unsatisfactory and it was changed by Art. XVIII, Sect. 8, above-mentioned; and now he must make his election before injury. If he does not wish to be bound by "the Act" he must affirmatively reject it. The courts rigorously enforce the new law. Children, even though illegally employed, one 13 years of age and the other 11, have been held bound by an election resulting from their failure to reject the Act before injury.

S. H. Kress & Co. v. Superior Court, 66 Ariz. 67, 182 P(2) 931;

Weaver v. Martori, 69 Ariz. 45, 208 P(2) 652.

Our own case, of course, differs on the facts, for here a suit against a third party is involved. The statute defining an election, is, however, the same in language (56-

950) and it is difficult to understand how an election of remedies as against one's own employer is to be determined by one set of rules and an election against a third party by another. Giving the employee the most favorable consideration, we submit that he may not overcome an election made as provided by 56-949 and 56-950 in the absence of some fraudulent or inequitable conduct that prevented him from freely acting.

Actions involving third party tortfeasors have been before our Supreme Court but twice.

Moseley v. Lily Ice Cream Co., 38 Ariz. 417, 300 P 958;

Industrial Commission v. Nevelle, 58 Ariz. 325, 119 P(2) 934.

In the *Moseley* case, the Plaintiff was in the employ of Maricopa County, an insured under the Compensation Act. While in the course of his employment he was injured by a truck driven by the Lily Ice Cream Company, the alleged third party tortfeasor. Moseley applied for compensation and received and cashed one check of $42.39. He then brought suit against the Ice Cream Company alleging negligence. He lost the case below and appealed to the Supreme Court of Arizona where the judgment was affirmed. He was held bound by an election resulting from his acceptance of said compensation.

The appellant's appeal was based largely on the proposition that Section 56-949 was unconstitutional in that it violated Art. 18, Sect. 6, of the Arizona Constitution which provides that the right of action to recover damages for injuries shall never be abrogated. The court, after what

was apparently a very thorough consideration of the statutes and decisions of other states, upheld the Arizona Statute (56-949). The court said:

> "We are of the opinion both on authority and on a logical interpretation of the language of our statute that, under its provisions, when payment under the Compensation Act is chosen by the injured employee, his rights of every nature against the third person pass as a matter of law to the state or other insurer, and no right of action, either direct or indirect, remains in him as against such third person."
>
> (See Page 423 of the Arizona Reporter and 960 of the Pac. Reporter)

It will be noted from this decision that the appellant therein undertook to raise the point that on the particular facts of his case he had not made a binding election by accepting the one payment of compensation, even if the Statute were constitutional. The Court refused to hear that contention, holding that it had not been pleaded and was not an issue in the case.

In the *Nevelle* case, an employee of a motor company, insured under the Compensation Act, was injured while in the course of his employment because of a collision with an automobile driven by Nevelle. The injured workman applied to the Commission for compensation, which made an award in his favor and also found that the injuries were due to the negligence of Nevelle, the third party. The Commission, claiming an assignment of the cause of action under Section 56-949, sued Nevelle at common law and recovered judgment which was in excess of the amount the Commission had paid the injured workman; and the judg-

ment provided that the excess should be payable to the injured workman. The question in the case was whether this excess was recoverable against the third party tortfeasor either by the Commission or the workman. Here again the Statutes of many states were reviewed and the conclusion reached, first, that the entire cause of action of the injured workman had been assigned to the Commission by his acceptance of compensation benefits and that he had no further interest therein, and, second, that the Commission could not recover for anything in excess of the amount payable by it to the workman under the Compensation Act.

In the course of the opinion, the court said:

> "The question of the amount which might be recovered by the commission was not discussed (in the Moseley case) as that was not an issue in the case, but we did explicitly and expressly hold that any right which the injured employee might have had against the third person no longer belonged to him but was vested in the Commission."

It will be noted that in none of these cases is there a holding by the Arizona Court that the validity of an election either as against an employer or a third party is dependent upon the condition laid down by the Court of Appeals in the following language:

> "The construction placed upon this constitutional limitation by the Arizona courts impels the conclusion that a "reasonable election" of remedy under Arizona law is tantamount to a waiver—"an intentional relinquishment or abandonment of a known right or privilege." (Cf. *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938).) An injured workman then is accorded a "reasonable election" only when he has (1) knowledge of

the alternative remedies available and (2) knowledge that the law precludes him from pursuing but one of such available remedies. (Cf. *Consolidated Ariz. Smelting Co. v. Ujack,* 15 Ariz. 382, 139 Pac. 465, 467 (1914).) Absent such knowledge, to seek one remedy does not constitute an election to waive another. (See *Johnsen v. American Hawaiian SS. Co.,* 98 F.2d 847 (9th Cir. 1938).)"

In support of the court's conclusion, it refers to *Consolidated Arizona Smelting Company v. Ujack,* supra.

With all due respect to the Court of Appeals, we submit that this is an entirely erroneous view of that case. It is concededly a case of high importance on the question, perhaps the leading case in Arizona, but in our practice it stands for the reverse of the view the Court of Appeals has taken of it. See 6 A.L.R. (2), page 14, note 10.

The application of the *Ujack* case insofar as suits by a workman against his employer are concerned has been considerably limited by the requirement that the employee elect before his injury rather than be allowed to elect thereafter, as was the case when the *Ujack* case was decided, but there are instances still in which an employee has after his injury a right of election to sue his employer, even though he did not reject the Act. These instances are where the employer has failed to post notices of the terms of the Compensation Act in the manner prescribed by Statute or where the employee's injury is due to the employer's wilful misconduct. See Sections 56-944, 56-945 and 59-946 in the index.

We submit that under Section 56-950 as construed in the light of the *Ujack* case, if an employee in either of those situations brings an action against his employer either at

common law or under the Employer's Liability Act, or both, he may not thereafter claim compensation and, vice versa, if he claims compensation, he may not thereafter bring such an action against his employer under either of said acts.

The other case cited by the Court is:

Johnsen v. American Hawaiian SS, 98 Fed.(2), 847 (9th Circuit, 1938).

We believe the Court of Appeals was very largely influenced by this decision. It involved the question whether an employee insured under the Federal Longshoremen Act had by his acceptance of compensation thereunder assigned to his employer any right to recover damages for negligence against a third person and thereby precluded himself from suing such third person. This Statute, being:

44 Stat. 1440, C. 509, 33 U.S.C.A., Sect. 933;
10 F.C.A. Title 33, Sect. 933,

read before amendment as follows:

> "Acceptance of such compensation shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person, whether or not the person entitled to compensation has notified the deputy commissioner of his election."

The Court of Appeals in the *Johnsen* case did hold that the Statute should have no application if an employee in accepting compensation did not realize he was put to a choice of alternative remedies and that by choosing one he excluded the other.

That interpretation of the Statute found no favor in other courts. In the second and third Circuits the courts held that mere acceptance of compensation precluded the employee from suing the third party tortfeasor.

For brevity and a list of the cases, with statutes quoted, we call the court's attention to Note 18 to its opinion in

American Stevedores v. Porello, 330 U.S. 446, 67 S.Ct. 847, 91 L.Ed. 1011.

(It could not be said that this court in the *Porello* case approved the stand taken by the courts of appeals in the second and third circuits and disapproved the holding of the court for the 9th circuit, but we do note this language of the opinion:

> "The petitioner admits that 33(b) of the Longshoreman's Act was amended in 1938 so that mere acceptance of compensation, without an award, does not operate as an assignment to the employer of the injured employee's cause of action against a third party tortfeasor, a conclusion which courts had reached under the former wording of the Act.")

Note 18, after quoting the Statute (like our 56-949), reads:

> "Under this form of statute, courts had held that acceptance of compensation precluded the employee from suing a third party tortfeasor," (citing cases as noted above.)

In one of those cited, *Toomey v. Waterman S. S. Corp.,* 123 F.(2) 718 (C.C.A. 2) (Augustus N. Hand, speaking for L. Hand and Charles E. Clark) the court expressly declared that the employee's "conscious exercise of election"

was, in the face of the statute, immaterial, and said of the *Johnsen* case:

> "In Johnsen v. American-Hawaiian S.S. Co., 98 F.(2) 847 the Court of Appeals for the ninth circuit overlooked the definite language of Section 933(b) whereby acceptance of 'compensation shall operate as an assignment to the employer of all right * * * to receive damages against such third person * * *'."

And respectfully we suggest the same court "overlooked" the equally positive language of our sections 56-949 and 56-950.

We do not here have a case where the employee was in ignorance of his claim against the third party for negligence —no element of mistake as to the facts. Nor do we have a case involving fraudulent or inequitable conduct on the part of the defendants or any one else by which the appellee was induced to accept compensation and other benefits under the Act. There have been Arizona cases where the element of fraud entered. In each of these the employee had rejected the Act but later sought its benefits and the court laid down the rule that whether his rejection (which amounted to an election not to take compensation) was valid or not was to be tested by the principle of equity permitting avoidance of contracts for fraud.

> *Bradley v. Ind. Com.*, 51 Ariz. 291, 76 P.(2) 745;
> *Red Rover Copper Co. v. Ind. Com.*, 58 Ariz. 203, 118 P.(2) 1102, 137 A.L.R. 740.

Our Arizona Supreme Court has, we submit, taken the same view of our section 56-949 that the Court of Appeals in the second and third circuit have taken of the like provision of the Longshoreman's Act, and, we believe, the Court

of Appeals was in error in applying the rule of the *Johnsen* case.

PLAINTIFF'S OWN CASE ON THE FACTS AS TO ELECTION

The plaintiff was injured on June 17, 1949. On July 6, 1949, he forwarded application forms for compensation to the Commission (R 164). He made several supplemental claims for compensation, one on July the 14th, 1949, another August 15th, 1949, and another August 30, 1949, and the last one September 14, 1949 (R 177-185), but later withdrew the last one (R 108). The Industrial Commission on July 9, 1949, acted upon the first application and entered its findings and order allowing compensation (R 186). For the period beginning June 18, 1949, to and including August 30, 1949, he received $621.85 as compensation (R 175) and medical benefits in the sum of $1,037.34. There is no dispute about these payments and by stipulation the Industrial Commission was given a lien therefor, totaling $1659.19, on the plaintiff's judgment (R 81). On October the 25th the plaintiff filed with the Commission a document designed for the election of remedy against the third party (R 168)—(it bears date November 12, 1949, but was actually filed as indicated.) It purports to elect to sue Sanderson and Porter under the provisions of Section 56-949. This election was not honored by the Commission and the plaintiff took no further steps before that body or by certiorari to the Supreme Court of Arizona (R 124).

The plaintiff alleged in his complaint that the application forms for compensation were sent to him by the Commission without request from him and that while he was still hospitalized and without means to support his wife and family and without advice of counsel, he filled the forms

out and sent them to the Commission; that he made no election of remedy since he had no knowledge of the necessity of so electing, or that acceptance of compensation might constitute an election or waiver; that after he had accepted "3 or 4" compensation checks, and sometime after August 15, 1949, he consulted counsel and was advised that he might have made an "apparent election, election or waiver"; and that on October 24 he filed an election of remedy choosing the right to sue the third party; that his name was removed from the compensation rolls and that he had not accepted compensation after August 15, 1949 (R 11).

At the trial he testified that he had made the claims for compensation and that after he employed attorneys they told him at first they did not know whether he had the right to sue or not; also that he thought at all times that he had the right to sue Sanderson and Porter and also to accept compensation and that he didn't suspect that he couldn't do both until he consulted his lawyer (R 107-109).

It is clear, therefore, that appellee's right to change the election resulting from accepting compensation must be founded on his contention that he thought he had the right to take compensation and also to sue Sanderson and Porter and that by filing claims and taking compensation benefits he did not foreclose his right to sue Sanderson and Porter.

Taken as true, such view of the law under the Arizona decisions was wrong and should not have been accepted as correct by the Circuit Court of Appeals.

APPELLEE'S REMEDY THROUGH ARIZONA SUPREME COURT

We also think that the appellee was bound to accept compensation in the absence of any effort on his part to secure a reversal of the Commission's refusal to permit him to

enforce the election he filed in October 1949 (R 168). The award of the Commission was a clear assumption of jurisdiction (R 186) and in our view any effort to avoid it should have been presented in accordance with the provisions of the Arizona Statute, 56-972, which allows a writ of certiorari to the Supreme Court after a party to compensation proceedings has exhausted his remedy before the Commission.

The sole authority to reverse the orders and actions of the Commission is in the Supreme Court of the State.

S. H. Kress Company v. Superior Court, 66 Ariz. 67, 182 Pac.(2) 931.

Nothing but confusion can result if employees dissatisfied with the action of the Commission in the matter of election of remedies may appeal to the superior courts. When the plaintiff first brought this case, he apparently took the position that the election or the apparent election he had made should be set aside by a Court before he could recover (see prayer to complaint, R-12; also later amendment of prayer, R-66). We believe he was right and that his effort in that regard should have been before the Supreme Court of the State.

That tribunal is the ultimate and final authority on the scope and effect of our Compensation Act. Its decisions are binding on the Federal courts. In the interest of harmony, effective and prompt enforcement of the Act, the legislature, we believe, intended that the employee should resort to the Supreme Court of Arizona if at any time he invokes the jurisdiction of the Commission. Perhaps the plaintiff in this case could have ignored the Commission

in the beginning and filed his suit against the third party, but having taken compensation under an award from the Commission, the remedy open to him when he decided to sue Sanderson and Porter was first to have his earlier election set aside by the Commission or on certiorari by the Arizona Supreme Court.

At this point, we desire to call to the Court's attention, and we trust the Court will consider this as a certificate, that there is now pending in the Supreme Court of Arizona on certiorari from the Commission an action in which one Frank E. Pressley is plaintiff and the Industrial Commission of Arizona is respondent, No. 5431, wherein the meaning and scope of sections 56-949, 56-950, as applied to actions against third parties, such as this one, are involved. Amicus curiae in that case also attack the constitutionality of 56-949 and endeavor to have the court overrule the *Moseley* and *Nevelle* cases, supra. The briefs of the respective parties have been filed and the case was argued and submitted on April 16th. We called this Arizona case to the attention of the Court of Appeals.

In that case, Pressley was the injured employee and entitled to compensation insurance from his employer. He filed a claim with the Industrial Commission but actually accepted no compensation therefrom, having meanwhile consulted an attorney and concluded to sue a third party for negligently causing his injury. He had received certain "accident benefits," said to be of a different category from medical benefits, and the point was made they are not within the purview of 56-950. He, however, applied to the Industrial Commission for an award permitting him to make an election, notwithstanding his earlier application for com-

pensation and acceptance of accident benefits, to sue the third party. This was denied by the Commission and the employee took by certiorari his case to the Arizona Supreme Court—a procedure we contend appellee here should have followed.

We believe that the decision of the Arizona Supreme Court in the *Pressley* case is bound to pass upon questions of law pertinent to the inquiry before this Court, and that it may perhaps be controlling on this Court under the doctrine of *Erie Railroad Company v. Tomkins,* 304 U.S. 64.

It is, therefore, respectfully contended that the interpretation put upon the Arizona Statutes and decisions by the Circuit Court of Appeals is erroneous and that, accepting as true plaintiff's own testimony, the appellee did by filing claims with the Commission and accepting compensation and medical benefits therefrom make a binding election under Sections 56-949 and 56-950 whereby any cause of action he had against these petitioners was assigned to the Commission and appellee could not thereafter recover thereon against petitioners.

III (a) and (b)

(See Reasons for Allowing Writ in Petition)

Right to a Jury Trial on Issues of Identical Employ and Election of Remedy

(a) *Identical Employ.* The Court of Appeals declares there was evidence pro and con on this issue but that the determination thereof was for the judge alone. Under the Constitution, Article 18, Section 8, and Section 56-949, if the plaintiff was in the same employ as these defendants he cannot recover. This issue is independent of the issue of election of remedies. If the "employ" of plaintiff and

defendants was identical, it is entirely immaterial whether the plaintiff made an election or not.

The Court of Appeals groups the two issues as follows:

> "It is axiomatic that 'every court of general jurisdiction has power to determine whether the conditions essential to its exercise exist.' (Texas & Pac. Ry v. Gulf Ry., 270 U.S. 266, 274 (1926); see Rhode Island v. Mass., 12 Pet. (37 U.S.) 657, 718-720 (1938).) Here the district court had jurisdiction of the subject matter only if plaintiff and Sanderson & Porter were 'not in the same employ' and if plaintiff had not made an election under the statute to take compensation. (S. H. Kress & Co. v. Superior Court, supra, 66 Ariz. 67, 182 P.2d 931). Being jurisdictional, these issues were triable to the court, not the jury. And the district court properly withheld them from consideration by the jury. (See Weaver v. Martori, 69 Ariz. 45, 208 P.2d 652 (1949); State v. Phelps, 67 Ariz. 215, 193 P.2d 921, 924 (1948); Dolese Bros. v. Tollett, 162 Okla. 158, 19 P.2d 570 (1933)."

THE JURISDICTIONAL QUESTION

The Arizona Supreme Court defined jurisdiction over subject matter of a cause of action in *State v. Phelps,* supra, (see the quotation just above), as follows:

> "In Tube City Min. & Mill Co. v. Otterson, 16 Ariz. 305, 146 P. 203, 206, L.R.A. 1916E, 303, this court said: 'The test of jurisdiction is whether or not the tribunal has power to enter upon the inquiry; not whether its conclusion in the course of it is right or wrong. (Citing cases.)'
>
> "In this Tube City case our court quoted with approval from Manley v. Park, 62 Kan. 553, 64 P. 28, as follows: 'Jurisdiction over the subject-matter' is the right of the court to exercise judicial power over

> that class of cases; not the particular case before it, but rather the abstract power to try a case of the kind or character of the one pending; and not whether the particular case is one that presents a cause of action, or, under the particular facts, is triable before the court in which it is pending, because of some inherent facts which exist and may be developed during the trial. * * * By 'jurisdiction over the subject-matter' is meant the nature of the cause of action and, of the relief sought, and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred. * * * The power to determine and decide a case includes the power to decide it wrong as well as to decide it right. See also Bates v. Mitchell, 67 Ariz. 151, 192 P.2d 720." (67 Ariz. 215, 220, 193 P(2) 921 at 925.)

Justice Miller, in *Cooper v. Reynolds,* 10 Wall. 308, 19 L.Ed. 931, for this Court said:

> "By jurisdiction over the subject matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of the powers, or in authority specially conferred."

In *Behringer v. Inspiration C. C. Co.,* 17 Ariz. 232, 149 P. 1065, the plaintiff, as administrator of a deceased employee of the defendant, filed an action under the Arizona Lord Campbell's Act for injuries resulting in death and was met with a demurrer. The Supreme Court pointed out that the contention that the employee was bound by the Compensation Act was a matter of defense, saying:

"But, in the absence of such an allegation, should the court assume, as a matter of law, that there was no repudiation of the provisions of the Compensation Act, or that the employee had elected to pursue that remedy, or, rather, are not these matter of fact to be raised by plea or answer? It is evident that the defendant might be in a position to insist upon a settlement of the damages claimed under the Compensation Act, and yet waive that right. For instance, after an election by the employee to accept compensation in such a manner as to be bound, the employer might choose to take chances in a contest for damages for negligence if sued therefor, by the employee, and be within his rights. We therefore are of the opinion that, if there was an election to accept compensation, that fact is defensive matter, and, if not raised by plea or answer, may be waived by defendant. It follows that the general demurrer should have been overruled."

It is submitted that the subject matter of this action is a suit at common law for personal injuries due to negligence. In one form or another it has existed for centuries in England and in this country. There was no occasion for the plaintiff in this case to allege his employment with the Power Company, or that the appellants were independent contractors, or that he had accepted compensation in ignorance of his rights. In defendants' (petitioners') resistance to a simple action for negligence they could have omitted any reference to the Compensation Act at all.

The issue as to identical employ does not, we respectfully submit, go to the jurisdiction of the Court over the subject matter of this suit. It is an erroneous interpretation of our statutes and decisions to conclude that the Court had jurisdiction only if Sanderson and Porter were

not in the same employ as the plaintiff. Applying (for the argument) the Statute in the same manner as the Court of Appeals has applied it, jurisdiction over the subject matter would depend, not alone upon the finding that the parties were not in the same employ. There would have to be the additional finding that the defendants were not negligent. There are two necessary conditions to "jurisdiction"—negligence and absence of identical employ. The first sentence of the Statute reads:

> "If an employee entitled to compensation hereunder is injured or killed by the negligence or wrong of another not in the same employ, such injured employee, etc." (56-949)

The Court, upon filing the action, necessarily, it seems to us, had jurisdiction of the subject matter, of which a part was the determination not alone of the question of identical employ but of the question of negligence. The finding by the Court either that the defendants were not negligent, or that they were not in the same employ with the plaintiff, would defeat the action, but not the court's jurisdiction.

The holding that the court had the right to take unto itself the determination of the question of identical employ on the ground that it was a jurisdictional question (a conclusion resting on implication purely) is not only contrary to our decisions, but, we submit, is contrary to customary and usual practice prevailing in courts. If the court below had the right to determine that issue, independent of the jury, it had the right also, indeed it must if the reasoning of the Circuit Court of Appeals is correct, to decide the

issue of negligence, thus leaving nothing for the jury beyond the assessment of damages.

There seems to be a suggestion in the opinion that the petitioners maintained to the District Court that the issue of identical employ was for the court and not the jury. We are at loss to understand this suggestion. It is true that in the motion to dismiss (R 25) one ground was lack of jurisdiction over the subject matter, but that was based upon the allegations of the complaint concerning the election of remedies and the demand of the plaintiff (R 12) that the court set aside and render void any apparent election or waiver that the plaintiff may have made. That the trial court did not have jurisdiction to set aside an election would seem obvious, particularly in the light of Section 56-971, A.C.A. 1939 (see appendix). Apparently the plaintiffs thought the same way because at the very opening of the trial they moved to amend the complaint by striking out said demand (R 100). It was granted (R 66, 69).

When the defendants made their motion for instructed verdict at the close of the plaintiffs' case (R 124, etc.) and at the close of the entire case (R 142, etc.) and their motion for judgment non obstante (R. 84, etc.) they did not remotely suggest that there was any jurisdictional question involved in determining this issue of identical employ.

S. H. Kress, supra, cited by the Court as authority that this issue of identical employ is jurisdictional, involved an application for a writ of prohibition against the Superior Court to prevent it from entertaining jurisdiction in a case where an employee sued his own employer. The issue was whether or not the employee made an election of remedies against his employer by failing to reject the Act. The Court

held that the pleadings revealed such an election had been made and that it was a jurisdictional defect to the consideration of the case. (It will be noted, however, from reading the opinion that the main question in the case was whether an illegally employed infant of thirteen years could make a binding election of remedies, and it was to settle that question that the court entertained prohibition. The court was no less than apologetic even in that situation in sustaining the jurisdictional objection.)

That case involved election of remedies but did not involve the issue we are discussing—identical employ. The Court of Appeals grouped the two together, but there is essential difference between them.

Weaver v. Martori, also cited by the Court of Appeals, was a case involving a claim of an employee against his employer and the question of election of remedies by an infant of eleven years.

The *Phelps* case was a mandamus action by the State of Arizona against a Superior Court Judge that he proceed to try a criminal action. The judge thought it was beyond his jurisdiction. The court above took the other view and said, among other things, that the first duty of the court is to determine whether it has jurisdiction.

The *Dolese* case, supra, from Oklahoma, was an action, like this one, against a third party under a statute similar to ours, 56-949, and, discussing the issue of identical employ, the court did say that the trial court was required to determine whether it had jurisdiction of the subject matter of the action and that that was not a matter for the jury. We submit, however, that when the entire opinion is read the pertinent language of the decision on the jurisdictional question is suspectible of the interpretation that the evi-

dence was undisputed and for that reason the issue was properly not submitted to the jury.

In any event, this Oklahoma case has no binding force in Arizona. There are, no doubt, many points of similarity in the laws of the two states, and there are many points of difference, and the trial procedure is certainly not the same. Any conclusion by the Federal courts of the applicable law in Arizona should under the rule of *Erie Railroad Company v. Tomkins,* 304 U.S. 64, be based upon Arizona decisions.

(b) *Election of remedy.* The disputed issue of fact here was, as determined by the Circuit Court of Appeals, whether the plaintiff at the time he accepted compensation and other benefits from the Commission had knowledge of his alternative remedies and knew that by choosing compensation benefits he was precluding himself from any claim at law. As shown by *Behringer* case, supra, the plea that the plaintiff had elected another remedy is defensive matter and if not raised in the answer is waived. The *Kress* case, supra, as we have already pointed out, considered this issue as jurisdictional where employer and employee were involved, but the writ of prohibition sought in that case was used merely as a vehicle to decide questions affecting the compensation law. See last paragraph of the opinion, 66 Ariz. 67 at 75; 182 P.(2) 931 at 936.

III (a) and (b)

Right to Jury on Both Matters

No point was made by the appellees below that genuine questions of fact as to these issues could be taken from the jury. On the contrary, appellee's counsel cited to the Court

of Appeals as correctly stating the law on the issue of identical employ the following:

> "As in civil actions generally, where the evidence on a material issue in actions involving the relation of master and servant is conflicting or admits of more than one inference, the question thereby raised is one of fact for the determination of the jury; otherwise the question is one of law for the court. 56 C.J.S.P. 92."

Indeed, one of their requested instructions to the jury (No. 6, R 73) undertook to advise the jury on that score.

The right to a trial by jury is jealously guarded in Arizona. In all actions whether sounding at law, or in equity, the parties are entitled to have disputed issues of fact submitted to the jury. The verdict of the jury has the same binding effect in common law actions as it had at common law; and while the court may disregard the verdict of the jury in an action sounding in equity, it must nevertheless at the demand of a party submit the issues of fact to the jury, and "harken" to its conclusion.

Mounce v. Wightman, 30 Ariz. 45, 243 P. 916;
Stukey v. Stephens, 37 Ariz. 514, 295 P. 973.

III (c)

See Reasons for Allowing Writ in Petition

By the 7th amendment to the Federal Constitution, the right of trial by jury is directed to be preserved in suits at common law if the value exceeds $20.00. That this action sounds at common law, as it was understood and applied when the Constitution was adopted, there cannot be any serious question, we submit. The rights guaranteed under this amendment as well as under the Arizona Constitution

and laws are not to be whittled down to a point of disappearance by labeling them "jurisdictional," and, consequently out of the province of the jury. That is precisely what was done here; and not only that: but on the basis of a judicial presumption that the trial judge assumed the right to decide the fact issue himself, whereas every implication from the record is that he thought there was no issue of fact at all.

Presumably the question as to what is the subject matter of this action turns on the Arizona Statutes and decisions, but it would seem that the procedure for the trial of the facts involved is federal.

The seventh amendment still has some life left,

> *Dimick v. Schiedt,* 293 U.S. 474; 55 S.Ct. 296, 70 L. Ed. 603, 95 A.L.R. 1150,

and district court procedure rule 12(b)(1), giving district courts the power to dismiss on motion for lack of jurisdiction over the subject matter, was written in the light of the amendment. Rule 38(a) preserves the right to a jury trial as granted by the seventh amendment and Rule 39 requires the trial of all issues to be by jury, where demanded (see App.).

Rule 12(b)(1) carried forward in very much abbreviated fashion Section 37 of the Judicial Code, later appearing U.S.C.A., Title 28, Section 80. See 28 U.S.C. 1359 and 1447, dealing with collusive joinders and improvident removal.

There is no longer any doubt that the court need not send to the jury the issues of fact concerning the constitutional or statutory limitations upon the jurisdiction of federal courts, i.e., such questions as diversity of citizenship, and

amount in controversy, *McNutt v. General Motors,* A.C. 298 U.S. 178; 80 L.Ed. 1135; 50 S.Ct. 780, but there are cases where "jurisdiction" of the court depends upon the determination of an issue of fact inherent in the cause of action itself in which the courts universally hold, with apparent approval of this court, that the issue is for the determination of the jury. We refer to actions under the Federal Employers' Liability Act and allied statutes where the question is whether the plaintiff was engaged in interstate commerce, an issue to be raised by the pleadings and essential to the court's "jurisdiction." No case has been found holding that that issue of fact may be determined by the court alone. The cases, state and federal, are all the other way, and petitions for certiorari to this court have been uniformly denied. See 57 C.J.S., page 151.

While the plaintiff in this case originally undertook to have the court set aside the action of the Industrial Commission (R 12), a matter beyond the jurisdiction of the court, he amended before the trial began by striking out that part of his prayer (R 100), his motion in that regard being granted by the court (R 66), thus leaving his action one at common law against these defendants. It is submitted they had the right to have the issues of fact as to identical employ and election of remedy submitted to the jury.

CONCLUSION

Accordingly it is respectfully submitted:

1. That the petition for a Writ of Certiorari should be granted.

2. That the judgment of the Court of Appeals and of the District Court should be reversed and judgment ordered for petitioners because on the undisputed evidence plaintiff and petitioners were in the same employ, and the plaintiff made a binding election to accept compensation benefits.

3. The said judgment should be reversed and a new trial granted because the issues of identical employ and/or election of remedies should have been submitted to the jury. (The court's attention is again directed to the case now pending in the Arizona Supreme Court, which is mentioned above.)

Respectfully submitted,

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(Appendix follows)